*prima facie* burden, unless the employer terminates every one of its "younger" workers, *i.e.*, those outside of the ADEA's protected class. The Tenth Circuit decision is in accord with the Third Circuit, which has repeatedly held that it is sufficient for a plaintiff in a layoff context to make a *prima facie* case by merely showing he or she was discharged and someone younger was retained. *See Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497, 509-11 (3rd Cir. 1996) (holding *prima facie* case in the context of a RIF was satisfied by showing other unprotected workers were retained); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 n.1 (3rd Cir. 1988) (finding plaintiff could present a *prima facie* showing of discrimination simply by showing that the company retained one younger person); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n.2 (3rd Cir. 1984) (same). Such a conclusion cannot be squared with the decisions of other courts of appeals, namely the Sixth and Eighth Circuits and creates an untenable and patently offensive incentive for employers to avoid liability by making age-based decisions.

"Under the *McDonnell Douglas* scheme, '[e]stablishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee. . . . To establish a 'presumption' is to say that a finding of the predicate fact (here, the *prima facie* case) produces 'a required conclusion in the absence of explanation' (here, the finding of unlawful discrimination)." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742 (1993) (internal citations omitted). While the burden is not especially onerous, it is also not a formality, for "[i]f the trier of fact finds that the elements of the *prima facie* case are supported by a preponderance of the evidence and the employer remains silent, the court must enter judgment for the plaintiff." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311, 116 S.Ct. 1307, 1309 (1996). Accordingly, "there must be at least a logical connection between each element of the *prima facie* case and the illegal discrimination for which it establishes a "legally mandatory, rebuttable presumption." *Id.* at 311-312, 116 S.Ct. at 1310 (internal citations omitted). In other words, the *prima facie* case requires "*evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.*" *Id.* at 312-313, 116 S.Ct. at 1310 (emphasis original).

In the RIF context, an inference of age discrimination cannot be drawn by the mere fact that a younger, less experienced employee was retained during the RIF. In a large reduction-in-force, there will almost *always* be at least one retained employee younger than the plaintiff. The Tenth Circuit decision effectively eliminates the plaintiff's burden in the RIF context and creates a statutory seniority system by which RIFs must proceed on the basis of seniority – *i.e.*, that older and more experienced

workers must be presumed to be superior performers than their younger, less experienced counterparts. This is especially true in light of the Tenth Circuit's statement that the plaintiff has no burden to produce evidence that the comparators are similarly situated to plaintiff. [Appendix, pg. 4.a] Under the Tenth Circuit's decision, the employer's unexplained failure to retain the more experienced employee compels a finding of discrimination and in every instance raises an inference that an unlawful motive was at work. Although experience is valued in many circumstances, there is no empirical evidence to support the notion that it *must* trump all other factors.

For this reason, other courts of appeals have fashioned flexible rules to govern *prima facie* proof in RIF cases – rules that underscore the fundamental purpose of the *prima facie* case and its potential consequences. Indeed, the Eighth Circuit has repeatedly rejected the contention that a *prima facie* case of age discrimination in the RIF context is established merely by showing that the plaintiff's job duties were redistributed to younger employees and requires a plaintiff to come forward with *additional* proof that age was a factor in the layoff decision. *See Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) (holding that the plaintiff failed to establish a prima facie case despite evidence that his job duties were redistributed to younger, less experienced employees); *Bashara v. Black Hills Corp.*, 26 F.3d 820, 825 (8th Cir. 1994) (holding that a 56-year-old plaintiff failed to establish a prima facie case based on evidence that a 37-year-old assumed most of his job duties); *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1155 (8th Cir. 1985) ("[w]e agree with the Sixth Circuit that the mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case of age discrimination and that the plaintiff in such reorganization cases must come forward with additional evidence that age was a factor in his termination...."); *Chambers v. Metropolitan Property and Casualty Ins. Co.*, 351 F.3d 848, 855-56 (8th Cir. 2003) (holding "replacement" by a younger employee is insufficient to establish a *prima facie* case of age discrimination in a RIF context where the plaintiff's duties have either been eliminated or redistributed within the employer's remaining work force); *Stidham v. Minnesota Mining and Manufacturing, Inc.*, 399 F.3d 935, 939 (8th Cir. 2005) (same).

The Sixth Circuit is in agreement with the Eighth Circuit that a plaintiff in the RIF context must come forward with additional evidence that age was a factor in the termination decision. According to the Sixth Circuit, "[a] different result would allow every person age 40-and-over to establish a *prima facie* case of age discrimination if he or she was discharged as part of a work force reduction." *Barnes v. GenCorp Inc.*,

896 F.2d 1456, 1465 (6th Cir. 1990); *see also Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 (6th Cir. 1980) (holding evidence that a younger person was retained in a position which the plaintiff was capable of performing was insufficient to meet the standards of a *prima facie* case of age discrimination in a RIF context); *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365 (6th Cir. 1999) (rejecting the plaintiff's argument that being the oldest terminated employee established a *prima facie* case of age discrimination in RIF context).

Under the Third and Tenth Circuits' analysis, a plaintiff presents a *prima facie* showing of age discrimination in *every* instance in which a younger employee is retained. Under this standard, anyone in the protected age group will presumptively have a cause of action in the RIF context under the ADEA. Such a result effectively does away with Respondent's initial *prima facie* burden. Given the current economic climate, layoffs are unavoidable. The circumstances in which a plaintiff states a *prima facie* case in the RIF context is an increasingly important issue. The Court should grant certiorari to address the split in the circuits and to provide standards that may be uniformly applied in the RIF context.

## II. The Tenth Circuit's Decision Fundamentally Misapprehends The Standards Applicable To Summary Judgment Set Forth By This Court In *Reeves* And Creates Highly Artificial Rules Which Cumulatively Suggest That Jurors Might Disbelieve An Employer's Otherwise Undisputed Testimony And Which Effectively Eliminate Summary Judgment In The Employment Context.

The Tenth Circuit's Decision fundamentally misapprehends the standards applicable to summary judgment motions and construes the applicable rules in a manner that effectively insulates employment cases from summary judgment. In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000), this Court held that a "plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." In so holding, the Court expressly cautioned lower federal courts against adopting specialized rules for discrimination matters that might have the effect of "insulat[ing] an entire category of employment discrimination cases from review under Rule 50 [or Rule 56]" and reiterated that trial courts should not "treat discrimination differently from other ultimate questions of fact." *Id.* Despite this warning, the Tenth Circuit's decision establishes several such rules that effectively insulate RIF cases from review and which warrant review by this Court.

### A. The Tenth Circuit's Decision Posits That Use Of Subjective Criteria Is Inherently Suspect And That A Juror Would Be Entitled To Disbelieve The Employer's Uncontroverted Evidence That It Relied On Such Criteria.

The Tenth Circuit's decision posits that an employer's reliance on subjective criteria is inherently suspect and that a juror would be entitled to view "with skepticism" an employer's uncontradicted evidence that it relied on such subjective criteria. [Circuit Order, App. at 4.a] The Tenth Circuit's decision is contrary to this Court's established precedent recognizing that an employer's reliance on subjective criteria is permissible and is contrary to the summary judgment standards set forth in *McDonnell Douglas* and reiterated in *Reeves*.

This Court has expressly recognized that an employer will *inevitably* be compelled to rely on subjective criteria in making employment decisions – especially with respect to professional employees. "[S]uccess at many jobs [depends upon] qualities [that] cannot . . . be measured directly." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991, 108 S.Ct. 2777, 2787 (1988). "[Indeed], [i]t is self-evident that many jobs. . . require personal qualities that have never been considered amenable to standardized testing" or quantification. *Id.* at 999, 108 S.Ct. at 2799.

Following this reasoning, previous Tenth Circuit decisions and a long line of cases emanating from the other courts of appeals have recognized that in many instances, reliance on subjective employment criteria is not merely permissible, but, in fact, is unavoidable. *See Furr v. Seagate Tech., Inc.*, 82 F.3d. 980, 987 (10th Cir. 1996) (rejecting the plaintiff's argument that "potential" as a layoff criteria created an inference of age discrimination and reasoning that "[f]uture job potential is certainly something that a company might legitimately want to consider in its RIF decision. . . . Indeed, . . . Congress enacted the ADEA to combat 'the setting of arbitrary age limits regardless of *potential* for job performance.'") (internal citations omitted) (emphasis in original); *Chapman v. AI Transport*, 229 F.3d 1012, 1034 (11th Cir. 2000) ("[i]t is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation. . . . To phrase it differently, subjective reasons are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions."); *Clay v. Holy Cross Hospital*, 253 F.3d 1000, 1002-03 (7th Cir. 2001) (affirming summary judgment in a

RIF case where part of the layoff decisionmaking process involved an assessment of each physician's practice, including subjective factors like how hard a physician was working and whether the physician was engaging in efforts to build a profitable practice); *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994) (holding that the absence of objective criteria is not probative of discriminatory animus in RIF); *Amirmokri v. Baltimore Gas & Electric Co.* 60 F.3d 1126, 1130 (4th Cir. 1995) ("good interpersonal skills and ability to lead a team" may be proper basis for promotion decision).

The Tenth Circuit's decision in *Zuniga* punishes employers for doing the unavoidable and cannot be reconciled with *Watson, supra*, prior Tenth Circuit precedent, and other courts of appeals which recognize that the anti-discrimination statutes do not deprive an employer of the ability to rely on important criteria in employment decisions merely because those criteria are only capable of subjective evaluation. An employer in a layoff must be permitted to evaluate employees pursuant to the criteria that it deems crucial to the success of its business. Contrary to the Tenth Circuit's decision, there is nothing inherently suspect about the use of subjective criteria that are indisputably important to the Material Management Analyst position.

Further, the Tenth Circuit's decision supposes that a jury would be entitled to render a verdict in a plaintiff's favor based on the "skepticism" jurors may harbor regarding the subjective standards the employer has applied. Under the Tenth Circuit's view, a district court cannot grant summary judgment where the employment decision is supported with witnesses' undisputed testimony or affidavits because the proffered reason depends on the credibility of the witnesses. In the Tenth Circuit's view, the issue of pretext, in such a case, *must* be reserved for the jury.

However, such a rule misconstrues the *McDonnell Douglas* analysis and overlooks the Supreme Court's clear directive that the burden is on the plaintiff to *affirmatively* come forward with evidence showing pretext. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514 (1986) (even thoroughly "discredited testimony is not . . . considered a sufficient basis for drawing a contrary conclusion. . . Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment"). The mere fact that the jury may be skeptical about the employer's otherwise *undisputed* testimony would not be sufficient to permit a jury verdict in plaintiff's favor. *Id.*

The Tenth Circuit's interpretation of the summary judgment standards would change the employer's burden of production to a burden

of persuasion and would preclude summary judgment in virtually *every* ADEA RIF case where the explanation for adverse action inevitably rests on the testimony of the decision-makers – even if such testimony is undisputed. Because the Tenth Circuit's decision effectively writes Rule 56 out of the Federal Rules and is contrary to *Reeves*, this Court should grant certiorari

### B. The Tenth Circuit Decision Establishes A Rule That Defeats Summary Judgment Whenever Criticisms Of A Plaintiff Could be Considered Consistent With A Stereotype.

Respondent's supervisor, Reid, testified that he did not believe that Respondent had as much "potential for change" as others in his group. [Circuit Order, App. at 10.a] Because the Tenth Circuit believed this statement to be consistent with a stereotype of older employees, it concluded that the observation was "*direct evidence*" of age discrimination and capable of supporting a jury verdict. However, stereotypes are not universally false when applied to individuals. Older employees *can* be resistant to change. Rule 56 does not permit a court to excuse an older worker from the normal summary judgment rules whenever criticisms about the plaintiff are consistent with a stereotype. The Tenth Circuit decision imposing such a rule cannot be squared with *Reeves*.

Reid explained that he based his rating of Respondent on his *objective observations* that Respondent was not proactive in his communications with his customers, that he did not maintain accurate inventories, and that he refused to use tools available to him, which in Reid's opinion would have enhanced Respondent's job performance. [Circuit Order, App. at 9.a] Reid's observations were corroborated by other managers. [District Court Order, App. at 18.a] Rather than controverting Reid's observations, Respondent *admitted* that he received complaints about these very performance issues from other managers. [*Id.*] Nevertheless, the Tenth Circuit improperly translated Reid's testimony into "old dogs can't learn new tricks" and found that a jury could infer discrimination based on Reid's testimony alone. [Circuit Order, App. at 10.a]

In a RIF context, employers are *expected* to assess an employee's skills and abilities to meet current and future needs of the business. *See Furr v. Seagate Technology, Inc.*, 82 F.3d at 987 ("congress has recognized potential as a legitimate factor distinct from age" and "[s]imply because there may be a correlation between age and potential does not mean that potential cannot be used as a selection criteria"); *Brocklehurst v. PPG*

*Industries,* 123 F.3d 890, 896 (6th Cir. 1997) (holding that statements that employee had less potential than coworkers and that employer needed vitality and direction did not prove that age was a determining factor in layoff decision and reasoning that "[a]n employee can reach the end of his or her potential at any age"). Relying on such a *legitimate* criterion *cannot* be inherently suspect, and a plaintiff *cannot* get "a pass" on summary judgment whenever an employer relies on such criterion. This is especially so in this case where there is *no* evidence to correlate Reid's observations of Respondent with age where his evaluation was based on specific, corroborated facts and he gave a 30-year-old almost the same rating as Respondent and gave another older employee (Ron Jaggers) (age 52) a significantly higher rating.

### C. The Tenth Circuit Decision Disregards Boeing's Uncontroverted Evidence.

The Tenth Circuit's decision conflicts with *Reeves* because it ignores the uncontroverted evidence put forward by Boeing. Although it is well settled that the nonmoving party is entitled to reasonable inferences from the evidence, this does not mean that a court is free to reject uncontroverted evidence submitted by the employer that is not favorable to the plaintiff. *See Reeves,* 530 U.S. at 151, 120 S.Ct. at 2110. This Court in *Reeves* held that a court should give credence to the evidence favoring the non-movant as well as "evidence supporting the moving party that is uncontradicted and unimpeached . . .". *Id; see also Roberson v. Alltel Information Services*, 373 F.3d 647, 653 (5th Cir. 2004) (holding that, under *Reeves*, a court may not disregard evidence that is offered by the movant and is uncontradicted and unimpeached); *Smith v. Honda of America Mfg.*, 101 Fed.Appx. 20 (6th Cir. 2004) (rejecting argument that a court is free to disregard uncontroverted and unimpeached evidence offered by the movant).

In this case, Boeing presented uncontradicted testimony by nine management witnesses that: (i) the individual performance evaluation ("PE") and ERP were distinct processes; (ii) that the PE measures performance against the individual's goals and objectives for the year while the ERP rating sheet measures an employee's performance relative to his or her peers; and (iii) that *none* of the decision-makers relied upon the PE for scoring the ERP assessment. [District Court Order, App. at 24.a]

Despite the undisputed evidence, the Tenth Circuit found pretext based on its finding that the PE form should have been used to assess employees during the ERP assessment. [Circuit Court Order, App. at 5.a -

9.a] In so finding, the Tenth Circuit ignores the undisputed evidence put forward by Boeing and dictates to Boeing the way its ERP process *should have* worked, even though it is well settled among the circuits that the manner in which an employer chooses to conduct a RIF is within the company's sound business discretion. *See e.g. Kautz v. Met-Pro Corp.*, 412 F.3d 463, 468 (3rd Cir. 2005) (holding that the court may not second guess the method an employer uses to evaluate its employees during a RIF); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 780 (8th Cir. 1995) (holding that an attack on the manner in which the employer chose to evaluate its employees for layoff is nothing more than an attack on the employer's business judgment and is insufficient to demonstrate pretext).

Under the Tenth Circuit's standard, no employer could choose to implement a RIF procedure separate and apart from the performance evaluation process – despite recognition that a performance evaluation and a RIF process serve two *fundamentally* different purposes and are different procedures. *See Hemmert v. Quaker Oats Co.*, 157 F. Supp.2d 864 (S.D. Ohio 2000) (recognizing the *differences* between a performance evaluation and a comparative ranking process and finding alleged discrepancies between the two could not establish pretext); *Coleman v. Exxon Chemical Corp.*, 162 F.Supp.2d 593 (S.D.Tex. 2001) (same). Indeed, under the Tenth Circuit's view, employers would always be required to perform employee evaluations with an eye towards a potential RIF and the future needs of the business. Alternately, an employer may only rely on past performance in conducting a RIF. In either scenario, the Tenth Circuit's rule mandates that the processes be the same.

The Tenth Circuit's decision creates a rule which allows courts to disregard an employer's uncontroverted evidence in order to usurp an employer's business judgment and substitute its own judgment with regard to the manner in which a RIF is conducted. Because the Tenth Circuit's decision is at odds with *Reeves*, this court should grant certiorari.

## III. The Tenth Circuit's Decision Relies On Evidence That Does Not Meet The Standards Of Admissibility And Which Is Inconsistent With The Approach Of Other Circuits.

### A. The Tenth Circuit Decision Allows Evidence of Other Unrelated Layoffs As Evidence of Pretext.

In this case, the Tenth Circuit found pretext based on the layoffs of other *unrelated* older employees – employees who are not similarly situated to Respondent. The Tenth Circuit's opinion is at odds with prior

Tenth Circuit precedent that "me-too" evidence can be admitted only in narrowly circumscribed circumstances, specifically where the plaintiff and the other employees involved are so similar that their experiences are "logically or reasonably tied" together. *See Curtis v. Oklahoma City Pub. Schools Bd. of Educ.*, 147 F.3d 1200, 1217-18 (10th Cir. 1998); *Coletti v. Cudd Pressure Control*, 165 F.3d 767 (10th Cir. 1999) (excluding the testimony of two former employees regarding their discharge from the company where those terminations were not logically and reasonably tied to the decision to terminate the plaintiff); *Sorensen v. City of Aurora*, 984 F.2d 349, 355 (10th Cir. 1993) (trial court properly excluded testimony of co-worker because there was no evidence "from which the alleged statements of the witnesses could logically . . . be tied to the decision to terminate [the plaintiff]"); *Heno v. Sprint/United Management Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (holding anecdotal evidence of discrimination should only be admitted if the prior incidents of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand by showing that the same supervisors were involved in prior discriminatory employment actions).

Indeed, in *Curtis*, the Tenth Circuit did precisely what the district court did in this matter – reject the offered "me-too" evidence because it related to employees "who did not work in the same department and had different job responsibilities." The Tenth Circuit's decision in *Zuniga*, however, held that the district court in this matter erred by admitting such evidence under identical circumstances.

The intra-circuit split in the Tenth Circuit highlights the split between the courts of appeal. The Tenth Circuit's decision in *Zuniga* is consistent with the First and Eighth Circuits, which allow "me-too" evidence as background evidence without requiring a showing that the "me-too" witnesses are similarly situated to the plaintiff. *See Conway v. Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987) (allowing evidence of purported discrimination against another employee as a "corporate state-of-mind" without making any similarly situated determination); *Phillip v. ANR Freight Systems, Inc.*, 945 F.2d 1054 (8th Cir. 1991) (finding district court's exclusion of testimony of other discrimination lawsuits because they were not similar to the plaintiff's case error; holding evidence admissible as "background evidence").

However, admitting such evidence is reversible error in the Second and Sixth Circuits. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 121-22 (2d Cir. 1984) (holding admission of testimony by six former employees, who were not similarly situated to the plaintiff, concerning the circumstances surrounding their terminations was error and insufficient to show a pattern

and practice of discrimination); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156-57 (6th Cir. 1988) (holding admission of testimony by other employees concerning their terminations was reversible error because the employees were not similarly situated).

The standard of admissibility of "me too" evidence presents an important question in employment discrimination cases. The courts of appeals have taken different approaches on this issue. Therefore, review by this Court is warranted.

### B. The Tenth Circuit's Decision Lowers The Threshold Of Reliability For Statistical Evidence.

The Tenth Circuit found convincing a statistical argument premised on a sample size so small that a meaningful conclusion cannot be drawn. Specifically, the Tenth Circuit found pretext based on evidence that 75% of the four (4) employees terminated in Respondent's job group were older. [Circuit Order, App. at 13.a] The Tenth Circuit decision lowers the standard of admissibility of statistical evidence and is at odds with other courts of appeal. This Court should grant certiorari to reaffirm the *reliability* threshold for the use of statistical evidence in federal employment litigation.

This Court has delegated the duty to the lower courts to ensure that scientific evidence, including numerical and/or statistical evidence, is not only relevant, but reliable. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) (holding the trial judge is not disabled from screening purportedly scientific evidence, but is tasked with ensuring that any and all scientific testimony or evidence admitted is not only relevant, but reliable); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999) (*Daubert's* "gatekeeping" obligation, requiring an inquiry into both relevance and reliability, applies not only to "scientific" testimony, but to all expert testimony).

The Tenth Circuit's observation that 75% of those employees who were actually terminated in Respondent's job group were older is based on a sample size of only *four* employees – a sample too small to produce any *meaningful* conclusion. Indeed, this is precisely the sample size rejected by the Fourth Circuit in *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir. 1994). In *Birkbeck*, the Fourth Circuit recognized the unreliability of such a small sample size, since any change will necessarily have a "potentially huge effect on the statistical showing." *Id.* at 511.

Other circuits, including the Second and Ninth Circuits, and, indeed, this Court have also recognized that results drawn from such a small sample are "inherently unreliable." *See EEOC v. Joint Apprenticeship Comm.*, 186 F.3d 110, 119 (2d Cir. 1999); *see also Mayor of City of Philadelphia v. Educational Equality*, 415 U.S. 605, 94 S.Ct. 1323 (1974) (holding simplistic percentage comparisons lacked real meaning in the context of the case and that such percentage comparisons were flawed); *Haskell v. Kamen Corp.*, 743 F.2d 113 (2nd Cir. 1984) (ten terminations insufficient to support an inference of discrimination); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663 (9th Cir. 2002) ("statistical evidence derived from an extremely small universe . . . has little predictive value and *must be disregarded*") (emphasis added). The Second Circuit has further noted that the "smaller the sample, the greater the likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it." *Pollis v. New Sch. for Soc. Research*, 132 F.3d 115, 121 (2nd Cir. 1997). For this reason, these courts have held that, as a matter of law, "discrimination *may not be proved* by statistics involving so small a pool." *Pollis*, 132 F.3d at 121 (emphasis added); *Birkbeck*, 30 F.3d at 511; *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072 (9th Cir. 1986) (holding sample size of 28 had little predictive value and should be disregarded and further noting that with such a small sample size, the slightest change in date can drastically alter appearances).

Furthermore, the Tenth Circuit further lowered the threshold of reliability for statistical evidence by holding that an expert was not needed to "explain the significance of Plaintiff's statistical data regarding the impact of the RIF on older employees." [Circuit Order, App. at 13.a] However, the shortcomings in the statistical evidence the Tenth Circuit saw as so self-evident are *precisely* why courts have looked with great skepticism on any statistical evidence that is not sponsored by an expert. *See e.g., Carter v. Ball*, 33 F.3d 450, 457 (4th Cir. 1994) (holding exclusion of statistics without expert testimony to explain methodology or relevance was permissible); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 455 n.1 (4th Cir. 1989) (affirming exclusion of statistics that were offered without expert testimony as to how the statistics related to the plaintiff's claim because, without expert testimony, the limited probative value was clearly outweighed by the possibility it might mislead or confuse the jury); *see also Fisher v. Vassar College*, 70 F.3d 1420, 1442-47 (2d Cir. 1995), *reh'g en banc*, 114 F.3d 1332 (2d Cir. 1997) (adhering to panel decision) (holding district court's reliance on unreliable statistics that were not supported by expert testimony was error). No expert would have attached meaning to such a paltry statistical showing, yet the Tenth Circuit's

misguided decision attaches significant weight to Respondent's inherently unreliable numbers.

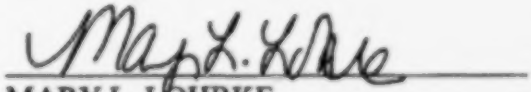
The standards of reliability for statistical evidence is an important issue in employment discrimination cases. This Court should grant certiorari to ensure that the standards of reliability are uniformly applied.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: October 31, 2005.

Respectfully submitted,



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(Any footnotes trail the end of each document.)

No. 04-5033

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VALENTINO ZUNIGA,
Plaintiff-Appellant,

v.

THE BOEING COMPANY
Defendant-Appellee.

Filed June 7, 2005

**ORDER AND JUDGMENT***

Before **LUCERO, PORFILIO,** and **BALDOCK,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Valentino Zuniga appeals from the entry of summary judgment for defendant Boeing in this action brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34. He challenges his reduction-in-force (RIF) termination after twenty-one years' employment with Boeing.

Mr. Zuniga was 62 years old at the time of his discharge, and he claims that he was selected for the RIF by his supervisor, David Reid (who was 36 years old), based on his age. Using the analytical framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the district court concluded that Mr. Zuniga established a prima facie case of age discrimination because he demonstrated replacement by a 43-year-old woman when Boeing "claimed a need to eliminate his position." Aplt. App. at 28, 25; *see Perry v. Woodward*, 199 F.3d 1126, 1140 (10th Cir. 1999) ("[T]he termination of a qualified minority employee raises the rebuttable inference of discrimination in every case in which the position is not eliminated."). But the district court ultimately granted summary

judgment in favor of Boeing on its conclusions that (1) "[Mr. Zuniga had] not offered sufficient evidence to permit a jury to find that the employer's asserted justification is false"; (2) he had not "eliminated all legitimate reasons for his termination"; (3) "[t]he decision to terminate [Mr. Zuniga did] not appear to have been pretextual or motivated by a prohibited reason"; and (4) his termination was the result of a "legitimate RIF." Aplt. App. at 39 & n.13.

On de novo review, *see Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002), we conclude that Mr. Zuniga demonstrated genuine issues of material fact regarding pretext that, under controlling precedent of this circuit, preclude the entry of summary judgment for Boeing. We therefore reverse and remand for further proceedings.

## I. Standard of review

> We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party.
>
> . . .
>
> In cases brought under . . . the ADEA where circumstantial evidence is the basis for the claim, our analysis at the summary judgment stage is governed by the burden-shifting framework laid out in McDonnell Douglas
>
> . . . .
>
> The McDonnell Douglas test involves a three-step analysis. First, the plaintiff must prove a prima facie case of discrimination. If the plaintiff satisfies the prima facie requirements, the defendant bears the burden of producing a legitimate, nondiscriminatory reason for its action. If the defendant does so, the plaintiff must either show that his race, age, gender, or other illegal consideration was a determinative factor in the defendant's employment decision, or show that the defendant's explanation for its action was merely pretext.

*Garrett*, 305 F.3d at 1216 (citation and quotation marks omitted).

> A plaintiff can withstand summary judgment by presenting evidence sufficient to raise a genuine dispute of material fact regarding whether the defendant's articulated reason for the adverse employment action is pretextual. A plaintiff can show pretext by revealing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action such that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reason.

*Id.* at 1217 (citation and quotation marks omitted).

## II. Analysis

Boeing relied on an "Employment Reduction Process" (ERP) as the basis for its decision to select Mr. Zuniga for the RIF. Aplt. App. at 21. The process initially consisted of a manager's baseline, subjective assessment of three areas related to each employee's job performance,[1] and Boeing's current and future needs. *See id.* at 44, 57, 60. The first assessment measured ten competencies or skills identified as appropriate for a particular job group. *Id.* at 21, 44. The competencies assessed were knowledge of the company business, materials management abilities, ability to work with people, problem solving/judgment, adaptability/ flexibility, customer satisfaction, initiative, dependability, integrity, and attention to detail. *Id.* at 44. This assessment accounted for 60% of the employee's overall ERP score. See *id.* at 21, 44. A second portion of the assessment measured the employee's performance in relation to Boeing's business goals and objectives, and it accounted for 25% of the score. *Id.* A third portion of the assessment measured the employee's performance in relation to Boeing's "2016 values"; it supplied 15% of the 100-point total score. *Id.* The employee's total ERP score was then used for the purpose of determining which employees, in comparison with their peers, had the best knowledge, skills, and abilities to meet Boeing's current and future business needs. *See id.* at 57 (instructing managers to be sure that the "assessments provide the ability to distinguish the skills and competencies that one employee possesses as compared to others in the selection group"). The comparison was accomplished by ranking all the employees in the particular job group from first to last, depending on each employee's total ERP assessment score and placing them in an A (top 40%), B (next 30%), or C (bottom 30%) category. *See id.* at 45, 66. The C-category

employees who scored lowest were to be the first employees terminated under the RIF. *Id.* at 22.

Boeing argued that it was entitled to summary judgment because Mr. Zuniga's ERP score ranked him as 21st out of 23 employees in his job group, thus qualifying him for the RIF and establishing a legitimate, nondiscriminatory reason for Mr. Zuniga's termination as a matter of law. But Mr. Zuniga argues that he presented evidence that is not only a sufficient basis from which a jury could reject Mr. Reid's asserted reasons for rating him low on the ERP, but that it is also sufficient to demonstrate that his age was a determinative factor in his termination. We discuss each type of evidence below.

**A. Replacement with younger employee.**

The Supreme Court has noted that a jury may "reasonably infer from the falsity of [an] explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (quotation marks omitted).

When the employer's proffered explanation for termination is challenged and eliminated or proved false, "discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." *Id.* Mr. Zuniga showed that he was replaced by a younger employee with less experience when Boeing "claimed a need to eliminate his position." Aplt. App. at 25-28. The district court acknowledged the problem with not denying summary judgment on this ground, but stated that Mr. Zuniga had "fail[ed] to offer this as evidence of pretext. From the limited evidence offered regarding [the replacement], the Court cannot discern pretext on this fact alone." *Id.* at 39 n.13. But at the summary judgment stage, "[a]ll inferences arising from the record before us must be drawn and indulged in favor of the [nonmovant]." *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1216 (10th Cir. 2003) (quotation marks omitted). And it was not the district court's function to make a factual finding about pretext – that is for the jury. *See id.* (stating that "the weighing of the evidence . . . [is a] jury function[], not [that] of a judge").

Nor was it Mr. Zuniga's burden to produce evidence regarding his replacement at this stage other than to establish that he had been replaced by a younger, less-experienced employee during an alleged RIF. Upon this

prima facie showing, it was Boeing's burden on summary judgment to establish that there were no genuine issues of material fact regarding an alleged, legitimate reason for Mr. Zuniga's termination. *See Garrett*, 305 F.3d at 1216. Boeing's "decision to reduce its workforce does not in itself legitimate [its] choice to fire the employee from the protected class rather than the younger employee." *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167-68 (10th Cir. 1998). Boeing's failure to meet its burden should have precluded the granting of summary judgment in its favor. *See id.* at 1168.

**B. Evidence that scores used to make RIF choices were inconsistent with prior performance evaluation.**

> [T]he evidence which a plaintiff can present in an attempt to establish that a defendant's stated reasons are pretextual may take a variety of forms. . . . A plaintiff may not be forced to pursue any particular means of demonstrating that a defendant's stated reasons are pretextual. A plaintiff typically makes a showing of pretext in one of three ways: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff.

*Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000) (citations and quotation marks omitted).

We have stressed that subjective judgments are viewed with skepticism in the pretext inquiry. *See Garrett*, 305 F.3d at 1217-18 (collecting cases and holding that subjectivity by decision-maker in termination decision is relevant evidence of pretext); *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1328 (10th Cir. 1999) ("Evidence of pretext may include . . . the use of subjective criteria."); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981) (stating that, although subjective criteria is not wrongful per se, "[o]bviously subjective decision making provides an opportunity for unlawful discrimination").

Accordingly, this court has recognized on numerous occasions that a plaintiff can defeat summary judgment by demonstrating that an evaluation offered to justify his termination conflicts with other

assessments of his work performance. *See, e.g., Garrett*, 305 F.3d at 1219; *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 564 (10th Cir. 1996); *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1380 (10th Cir. 1994). Mr. Zuniga presented evidence that his December 2001 job performance evaluation (PE) was intended to provide a basis for his January 2002 ERP scoresheet but that he was scored lower on the ERP than on the PE. The 2001 PE assessed communication abilities, problem solving/judgment, technical skills/knowledge/coaching, leadership, integrity, quality/productivity, customer satisfaction, working together effectively, health/safety, and business knowledge – areas that were also assessed on the ERP form. See Aplt. App. at 46, 44. As proof of the interrelationship of the two forms, Mr. Zuniga demonstrated that certain written materials instructing managers how to fill out the ERP forms used dotted arrows to show that the 2001 PE scores were to be reflected by the 2002 ERP competency assessment scores. *Id.* at 50. Thus, although only the ERP form served as the documentation for the comparison and ranking of employees in anticipation of the RIF, both documents necessarily evaluated past and current performance and job skills and competencies.

Boeing's RIF guidelines stated that employees were to be assessed by using the "most current Performance Evaluations." *Id.* at 76. Although Boeing argues that these particular guidelines were never shown to the managers before Mr. Zuniga was selected for the RIF, *id.* at 169, a former manager testified that managers were told to correlate or link the 2001 PEs with two sections of the 2002 ERP form. *Id.* at 124-26.

Mr. Zuniga then demonstrated that, while Mr. Reid rated him as "exceeds normal requirements," (ENR) (i.e., as having "superior performance that surpasses what is generally expected of employees") in the areas of problem solving, teamwork skills, and technical skills/coaching on his 2001 PE, see *id.* at 46, Mr. Reid rated him as a 3, or only "acceptable," in those same areas on two sections of the ERP, *id.* at 44. And he showed that, despite the fact that Mr. Reid rated him as "meeting normal requirements" (MNR) and communicating well with his customers, *id.* at 46, 47, he gave him only a 2.5 rating out of a possible 5.0 on the ERP (which was at the low end of the "acceptable" range) for communication performance, *id.* at 44. He argues that these discrepancies and the failure to properly follow RIF guidelines provide proof of pretext. *See Beaird*, 145 F.3d at 1168 (noting that noncompliance with a RIF guideline "can in some cases suffice to substantiate pretext").

Boeing denies a correlation between the 2001 PE and the 2002 ERP, insisting that "the [ERP] competencies are not tied to performance," while asserting that "the second and third ERP scores are performance-

based, [but] the employee's performance is to be assessed relative to his or her peers." Aplt. App. at 168 (affidavit of Denise Hendrickson). Mr. Zuniga challenges this claim, and Ms. Hendrickson's affidavit quoted above is inconsistent with her deposition testimony and with other evidence. See, e.g., Aplee. Supp. App. Vol. I at 412 (Ms. Hendrickson's deposition testimony stating, "[t]he competencies deal with the employee's current competencies. What are the knowledge, skills and the abilities that the employee currently has?"); Aplee. Br. at 6 (noting that in the first section of the ERP form, which accounted for 60% of an ERP score, the managers assessed their "direct reports against the competencies"); Aplee. Supp. App. Vol. I at 107 (RIF guidelines stating that "[a]ll employees are assessed to a baseline," and that managers are to "[a]pply consistent, job-related criteria to assess employees' skills and performance within each selection group"). It is difficult to understand how a baseline competency that is a statement of job skills and knowledge related to specific employment could be measured for a specific employee in any other way but to look at that employee's performance and ability. The *comparisons* between employees appears, rather, to have occurred *after* each employee had been evaluated as an individual and given a score on the ERP forms. The total score was used in the second step of the ERP process, which consisted of ranking all the employees in order of their ultimate ERP score. See *id.*; Aplt. App. at 45 (relative ranking summary).

Mr. Reid claimed that he was not aware that he was supposed to use the 2001 PE as a basis for the ERP assessment, and stated that he did not refer to Mr. Zuniga's 2001 PE, or to any prior evaluations, in determining the scores he gave Mr. Zuniga for each ERP category. Aplt. App. at 136. He insisted that he scored Mr. Zuniga on the ERP only by comparing him to other production-control employees.

It is undisputed, however, that seven different managers from different departments evaluated the twenty-three individuals who had production-control-type jobs, and that Mr. Zuniga was ultimately ranked against all of them. Aplee. Supp. App. Vol. II at 504. If it is true that Mr. Reid used the methodology Boeing alleges of not relying on performance but rating Mr. Zuniga's skills and abilities only as relative to other employees in the job group in order to arrive at the bulk of his ERP score, see Aplee. Br. at 18 & n.2, it is difficult to understand how Mr. Reid could have reasonably compared Mr. Zuniga to the nineteen individuals over whom he had absolutely no managerial oversight or knowledge of skills and abilities or past or potential performance. *See Beaird*, 145 F.3d at 1169 ("There may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination."). Accordingly, a jury could

determine that Mr. Reid did not in fact give Mr. Zuniga the low ERP scores for the reason stated and could then infer that Mr. Zuniga's age was a determinative factor in assigning the low ERP score to him. *See Reeves*, 530 U.S. at 147.

The Ohio case relied on by the district court, *see* Aplt. App. at 12-13, is inapposite. There, the same supervisor evaluated and then ranked five employees against each other in making her RIF decision between the five employees and gave undisputed reasons for assigning the rankings given to the employees. Further, the employee had no statistical evidence indicating age discrimination; and there was no inconsistency between the previous job evaluations and the subsequent RIF assessment. *See Hemmert v. Quaker Oats Co.*, 157 F. Supp. 2d 864, 870-73 (S.D. Ohio 2000).

Denying that he had reviewed Mr. Zuniga's 2001 PE before assigning ERP scores to Mr. Zuniga, Mr. Reid claimed at his deposition to have given Mr. Zuniga lower scores on the ERP than on his PE in part because of "the possibility that the tasks could be much different in the next year or two years. We didn't know for sure." Aplee. Supp. App. Vol. I at 223. But on the PE, Mr. Reid had evaluated Mr. Zuniga as "exceeding normal requirements" in "continuously develop[ing] and advanc[ing] technical capabilities." Aplt. App. at 46. As a second reason for rating him lower, Mr. Reid stated, without explanation, that, although Mr. Zuniga had been "very approachable" and had helped newer employees learn their jobs in the past, he did not think in the future that Mr. Zuniga would be "the person that people would come to in general for direction and knowledge related to production control." Aplee. Supp. App. Vol. I at 225. But Mr. Zuniga had twenty-one years of experience in production control at Boeing (plus an additional twenty years at another manufacturing company), and Mr. Reid had previously rated him as "exceeding normal requirements" in the area of his expertise being "recognized and sought by others." Aplt. App. at 46. In the PE, Mr. Reid had also praised Mr. Zuniga's "strong technical capabilities and knowledge of the business systems related to Production control." *Id.* at 47.

Mr. Reid stated that another reason he rated Mr. Zuniga more unfavorably on the ERP than on the PE was because the PE was "based on the particular job that he had at that time. He was very familiar with that job-when [on the ERP], it was the fact that he very well could be taken out of that comfort zone and how well would he do out of the comfort zone in a new task." Aplee. Supp. App. Vol. I at 226. But the 2001 PE noted that Mr. Zuniga had accepted a special assignment to implement and maintain a system and had "initiated matrix for daily tracking," from which a jury could infer that Mr. Zuniga was successful at new endeavors. Aplt. App. at

46. And Mr. Reid, who had supervised Mr. Zuniga for only a few months, admitted that he did not know how many areas Mr. Zuniga had been involved in as a production control coordinator in the past, *id.* at 144, and was not familiar with his past work experience because he never looked at a single "piece of paper from his personnel file before [he] filled out [Mr. Zuniga's ERP] form," *id.* at 135.

**C. Post hoc reasons for giving Mr. Zuniga a lower ranking.**

Mr. Reid's testimony further seems to be inconsistent. He stated that he ranked Mr. Zuniga lower than other, less-experienced employees because he did not believe Mr. Zuniga was going to be as good a coach in the future as he was in the past "with the changed circumstances," and would not be as good at problem solving in the future because he would not "be able to change with the circumstances." *Id.* at 141. But he later stated that he "thought [Mr. Zuniga would] be just as good an employee in the future as he was in the past" and downgraded him in ranking only for lack of "potential for change." *Id.* at 145. He supported his opinion that Mr. Zuniga did not have as much potential for change as other employees by stating that (1) Mr. Zuniga had not kept accurate inventory transactions in one incidence; (2) he did not want to use new tools in the machine shop that were being used plant-wide and which Mr. Reid thought "could have been helpful to him," Aplee. Supp. App. Vol. I at 237; and because (3) Mr. Zuniga was "not necessarily proactive in his communication" even though he "communicated well when asked questions," *id.* at 238. Mr. Zuniga points out, however, that Mr. Reid admitted he would have been aware of this same information when he evaluated Mr. Zuniga on his PE and gave him higher scores. See *id.* And we note that only the second reason given seems relevant to potential for change. In addition, it appears the only reason Mr. Reid gave other managers for ranking Mr. Zuniga lower than other employees at the January 2002 ranking meeting was his assertion that he received "numerous complaints about Val all the time [because] . . . the inventory was not right." Aplee. Supp. App. Vol. I at 394.

As the district court pointed out, Mr. Zuniga "vigorously disputes that Reid's testimony supports this justification." Aplt. App. at 23. In the end, the district court resolved the dispute in favor of Boeing, which was impermissible fact finding. As we noted recently,

> [i]t is not the purpose of a motion for summary judgment to force the judge to conduct a "mini-trial" to determine the defendant's true state of mind. So long as the plaintiff has presented evidence of pretext (by demonstrating that the defendant's proffered non-discriminatory reason is

> unworthy of belief) upon which a jury could infer discriminatory motive, the case should go to trial. Judgments about intent are best left for trial and are within the province of the jury.

*Plotke v. White*, __ F.3d __, __ , 2005 WL 984363, *10 (10th Cir. Apr. 28, 2005).

**D. Mr. Reid's comments as direct evidence of intent to discriminate.**

Mr. Zuniga argues that Mr. Reid's statements that he ranked Mr. Zuniga lower than other employees because he did not have as much "potential for change," Aplt. App. at 145, and because he may not do as well in new tasks or in different circumstances in the future, *id.* at 139-140, are themselves direct evidence of an intent to discriminate. *See Greene*, 98 F.3d at 563 (noting "that Congress' promulgation of the [ADEA] was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes such as that productivity and competence decline with old age" and that prohibited stereotypes include criteria like "Older employees are likely to be – ") (quotation marks omitted). He argues that Mr. Reid's statement is indicative of an improper ageist belief that an "old dog can't learn new tricks." Aplt. Br. at 32. The district court rejected this evidence, concluding that the Tenth Circuit has held that job potential is a legitimate factor distinct from age, even when there may be a correlation between age and potential, and even if potential is a subjective criteria. Aplt. App. at 33. The district court found that Reid's statements did not reveal a discriminatory motive. *Id.* Again, we conclude that the fact finding on the issue of Mr. Reid's motive and intent was one for the jury and not for the court. *See Plotke*, __ F.3d at __, 2005 WL 984363 at *10.

**E. Evidence that younger employees were treated more favorably.**

Further, Mr. Zuniga presented objective evidence demonstrating that, while his younger replacement and other, younger retained employees were given exactly the same or lower scores as he was on the 2001 PE in certain categories, younger employees were given higher ERP scores for those same categories, thus causing them to be ranked higher for RIF purposes. For example, both Mr. Zuniga and his younger replacement (and some other younger employees) were rated as MNR in communication and ENR in problem solving skills on their PEs. See Aplt. App. at 77-78. But while Mr. Zuniga received ERP scores of 2.5 in the first category and a 3.0

in the second, his replacement (and some other younger employees) received scores of at least 4.0 in both categories. *Id.* Mr. Zuniga was evaluated as ENR in technical skills/knowledge/coaching and teamwork, while his replacement was evaluated as only MNR in those two areas. *Id.* at 78, 80. But Mr. Zuniga received ratings of only 3.0 in those two categories, while the replacement was scored as a 4.0 in them. See *id.* An employee may establish pretext in RIF context by showing that she was "treated less favorably than younger employees during the reduction-in-force." *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988)

The district court discounted this evidence because the PE and ERP assessments did not use the same numerical scoring method; because the PE scores were not used "to rank these employees in relation to each other," and because Mr. Zuniga only used a "select number of [his] work group" in his analysis and also compared his scores to those of certain employees (Mr. Doyle, for example) who had been evaluated in managerial positions on their PEs but as production-control employees on their ERPs.[2] Aplt. App. at 30-31. We conclude that it does not matter that the PE and ERP forms used different scoring methods and had different ultimate uses because each form assessed competencies and job performance and a jury is able to distinguish between the values that were represented by each form. Accordingly, the jury could conclude that Mr. Zuniga was scored less favorably on his ERP because of his age.

That Mr. Zuniga compared only a limited number of employees in the example he submitted to the district court for summary judgment purposes goes to the weight of the evidence and not to its admissibility and does not change the fact that he showed a genuine issue of material fact regarding pretext. If Boeing had desired to produce evidence regarding other employees at the summary judgment stage to explain the differences, it could have done so in its reply. And even if Mr. Doyle and the other former manager were not comparable employees because their PEs and ERPs were based on their performance in different job categories, several of the other younger retained employees who received apparently favorable treatment were similarly situated to Mr. Zuniga, thus his evidence is not totally invalid or unreliable.

The district court stated that Mr. Zuniga's "selective choice of data presents a gerrymandered picture that is unreliable," and noted that he had not identified "an expert to testify to the statistical significance of his information." *Id.* at 30. The court concluded that the differences between the ERP and PE scores would not "suffice to show pretext on the part of [Boeing.]" *Id.* at 31. But, again, parsing of the evidence and determining

whether managers in fact favored younger employees by bumping up their competency scores on the ERP was a jury question, and not for the district court.

We also reject Boeing's argument that, because some of the skills team members made up of the various managers agreed that Mr. Zuniga's comparative ranking was proper based on some past incidents in which he allegedly failed to keep an accurate inventory and to communicate satisfactorily, Mr. Zuniga cannot show pretext as a matter of law. If Mr. Reid in fact intended to discriminate against Mr. Zuniga because of his age by ranking him low to begin with, post hoc justifications will not vitiate or excuse the discriminatory motive. *See Garrett*, 305 F.3d at 1218-19 (noting that "the mere fact that [the plaintiff's] evaluations bear evidence of past criticism of his work habits does not negate the possibility that the justifications given for [his] drop in rank and negative evaluations . . . are pretextual. A jury could reasonably infer that [the plaintiff's] supervisors discriminated against him by inflating and exaggerating long-standing critiques of his performance as a means of exercising . . . ageist animus towards him.").

Boeing also argues that, because two younger employees were informed of their prospective layoffs before Mr. Zuniga was terminated and two younger employees were tapped for layoff after he was terminated, he cannot show intent to discriminate because of age as a matter of law. But Mr. Zuniga showed that one of the younger employees who was supposed to be laid off before Mr. Zuniga was terminated was given a job in a different department (which Boeing asserts was the result of her applying for redeployment under established policy and that Mr. Zuniga did not apply for redeployment). He also showed that Boeing subsequently cancelled the potential layoffs of the two younger employees and then terminated James Vaughn, another employee who was over fifty-five and now the oldest employee in his job category during the subsequent RIF. While we agree that this is a hotly contested case, it is for a jury to determine whether Boeing's asserted reasons are valid or pretextual.

**F. Pattern and practice evidence.**

Mr. Zuniga sought to present evidence demonstrating that two other of the oldest employees at Boeing were terminated: James Hanna in March 2002 (the same date Mr. Zuniga was terminated), and James Vaughn in June 2003. *See Greene*, 98 F.3d at 561 ("evidence concerning make-up of the employment force and events that occurred after plaintiff's termination were entirely relevant to the question of whether or not age was one of the determinative reasons for plaintiff's termination; and . . .

*evidence not too remote in time that defendant terminated others in the 60-year-old age group would be entirely relevant to the question of defendant's policies and practices.*") (quotation marks omitted). The district court rejected and refused to consider the evidence because Mr. Hanna had worked in a different department and performed a different job, and because Mr. Vaughn reported to a different supervisor and, at the time of his termination, some of the ERP criteria and reviewing staff had changed. Aplt. App. at 34-35. The district court held that, because different supervisors were involved in the terminations, there was not a "reasonable relationship between the plaintiff's termination and others terminated simultaneously or later." *Id.* at 35-36. We disagree. The employees were all terminated or selected for the RIF within a year as part of a continuing RIF; their selection was based on similar, subjective criteria, and they all were the oldest employees in their respective departments at the time of their termination.[3] This evidence "is certainly not conclusive evidence of age discrimination in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome." *Greene*, 98 F.3d at 561 (quotation marks omitted); *see Bingman v. Natkin & Co.*, 937 F.2d 553, 556-57 (10th Cir. 1991) (holding that district court did not abuse its discretion in admitting evidence of another, older, employee's termination that "was close enough in time to be evidence of defendant's practice in terminating older employees" even though "circumstances were different at that later time"). Boeing could not establish that there are no genuine issues of material fact on the issue of pretext, so the matter is for a jury.

**G. Disparate impact as evidence of intent to discriminate.**

We reject the district court's holding that an expert witness was necessary to explain the significance of Mr. Zuniga's statistical data regarding the impact of the RIF on older employees. Juries are able to make basic inferences from simple statistical information, making an expert unnecessary. For example, an expert is not necessary to interpret statistical evidence showing that 75% of those employees who were actually terminated (or retired in lieu of termination) in Mr. Zuniga's job group (Zuniga-62, Wallingford-59, and Vaughn-56) during the RIFs were over 55 and two of them were evaluated by Mr. Reid.[4] *See Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987 n.4 (10th Cir. 1996) ("disparate impact may be evidence of intentional discrimination in certain cases"). We conclude that a jury could disbelieve Mr. Reid's stated reasons for rating Mr. Zuniga lower on the ERP than on his PE and infer from the favorable treatment of younger employees and the disparate impact on employees over fifty-five that Boeing had an intent to discriminate on the basis of age. *Cf. Harvey by*

*Blankenbaker v. United Transp. Union*, 878 F.2d 1235, 1244 (10th Cir. 1989) (in determining whether seniority system is valid, a "finding of discriminatory intent can be based on indirect, circumstantial evidence including evidence of discriminatory impact"). This is not one of those cases in which "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

The judgment of the district court is REVERSED, and the cause is REMANDED for further proceedings consistent with this order and judgment. Mr. Zuniga's motion to supplement his brief with argument and recent Supreme Court law holding that ADEA claimants may allege disparate impact claims is DENIED, as that case is not relevant to the discrete issues on appeal. On remand, however, and on proper motion, the district court may determine in the first instance whether to allow an amendment to his complaint to add such a claim.

Entered for the Court

John C. Porfilio
Circuit Judge

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] The parties also referred to the ERP assessment form as the ABC ranking form because the employees were subsequently placed into A, B, and C categories based on their ERP scores. *See, e.g.*, Aplt. App. at 22, 133.

[2] Mr. Zuniga's replacement was not one of these former management employees.

[3] The record shows that Mr. Vaughn was rated fairly highly (10/23) on the January 2002 ERP and higher than Mr. Mattimore (12/23), who was 60 years old at the time and the oldest employee. *See* Aplee. Supp. App. Vol. I at 299. Vaughn's supervisor testified that Boeing would not allow Mr. Mattimore to take advantage of the RIF to be laid off because "his performance was too good," but he retired anyway. Aplt. App. at 163. Surprisingly, Mr. Vaughn, who (by January 2003) was the oldest employee in the job category, ended up being evaluated and ranked the lowest on the next ERP, and was terminated in June 2003. *See id.* at 161-63.

[4] It appears that the only other employee in Mr. Zuniga's job group who was actually terminated in the 2002-03 RIFs was a 46-year-old man described as a "mediocre" employee who did not perform his job well. Aplee. Supp. App. Vol. I at 372, 271-72, 504.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

No. 02-CV-807-K(J)

VALENTINO ZUNIGA,
Plaintiff,

vs.

THE BOEING COMPANY,
Defendant.

**ORDER**

**Filed Feb. 26, 2004**

Before the Court is Defendant's Motion for Summary Judgment (Dkt. No. 29).

## I. BACKGROUND

Plaintiff filed suit on October 21, 2002 alleging Defendant violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621 *et seq.*, when it terminated him on June 22, 2002. Plaintiff alleges Defendant discharged him because of his age rather than as part of a legitimate reduction in force ("RIF"). Plaintiff was sixty-two (62) years old at the time of his discharge and had been employed by Defendant for twenty-one (21) years. His most recent position was Material Management Analyst, or Production Coordinator. As a Material Management Analyst, Plaintiff was responsible for ensuring that tools and parts were available for on-time start up of assembly according to production schedules, maintaining inventory of parts, monitoring work orders to determine their adherence to production schedules, and identifying and communicating part shortages and/or constraints. At the time of his termination, Plaintiff reported to David Reid, a manager in Production Control. Reid was thirty-six (36) years old at the relevant time.

Following the September 11, 2001 terrorist attacks, Defendant experienced a decrease in its commercial airplane production and announced that it would be reducing its workforce company-wide by approximately thirty percent (30%). Defendant's Tulsa site had previously

undergone a number of RIFs as a result of the decline in aerospace defense contracting work, decreasing its workforce from over 5,000 to 1,000 by the mid-1990's. As a result, the Tulsa workforce was generally comprised of good performers, many of whom had survived prior reductions. Nevertheless, Defendant had to make further reductions in its workforce in 2002. To accomplish this, Defendant developed the Salaried Employment Reduction Process ("ERP") as a means of selecting salaried employees for layoff once excesses were declared within specific job groups. To support the ERP, Skill Teams, consisting of the senior manager over a particular organization, his/her direct reports, and a Human Resources ("HR") representative, were formed. All salaried employees were initially placed by HR into job groups, normally consisting of employees holding the same job classification. These job groups were approved by the applicable Skill Team.[1] The Skill Teams over each job group then selected ten competencies that were identified as appropriate for the particular job group. These competencies accounted for sixty percent (60%) of the total numeric ERP score and evaluated whether in relation to his peers, the employee had the knowledge, skills, and abilities to meet the current and future business needs of Defendant.[2] Employee performance against business goals and objectives amounted to twenty-five percent (25%) of the ERP, and the employee's compatibility with Defendant's Vision 2016 plan amounted to the remaining fifteen percent (15%) of the total ERP score. Once the assessments were complete, employees were ranked within their job group according to their total numeric score. HR then assigned each employee a category assignment of A, B, or C according to a forced distribution. Once the category assignments were made, the applicable Skill Team met once more to review and approve the final relative rankings. Employees were then notified of the A, B, or C category assignment for the sole purpose of advising them of the likelihood of their being laid off. Employees in the C category were the most likely to lose their jobs. When reductions were declared within a specific job group, the employees with the lowest relative ranking were identified for layoff. At various points within this ERP process, Defendant claims to have performed statistical analyses to determine whether there was any adverse impact to employees over the age of forty (40) and over the age of fifty-five (55).

An ERP exercise was conducted in January 2002 for the Material Management Analysts, and the relative ranking summary was used to identify employees for layoff in 2002 as excesses were declared within this job group. In total, there were twenty-three (23) Material Management Analysts that made up their group, including Plaintiff. In accordance with the ERP, Plaintiff's first-line manager, David Reid, assessed Plaintiff (and

his other direct reports) to obtain a total ERP score. Reid scored Plaintiff at 64.40, putting him in the C category. Defendant supports Plaintiff's relatively low ERP score by offering testimony from Reid that Plaintiff failed to perform transactions necessary to maintain accurate inventory, refused to utilize tools which could possibly enhance Plaintiff's job performance, and failed to be proactive in his job performance with customers. Reid felt these difficulties, when viewed in light of the capabilities of Plaintiff's peers, warranted a relatively lower score. The record reveals that both Plaintiff and the Skill Team managers acknowledged incidents in which Plaintiff did not accurately maintain inventory or failed to communicate. *See* Def.'s Mot. For Summ. J. Ex. A at p. 133 ll. 23-25; p. 135 ll. 1-11; p. 136 ll. 2-9 and Def.'s Undisputed Fact No. 23 at pp. 10-11. Plaintiff vigorously disputes that Reid's testimony supports this justification, arguing that Plaintiff's 2001 Performance Evaluation ("PE") (performed shortly before the relevant ERP) contradicts Defendant's justification for the low ERP score. The written comments portion of Plaintiff's 2001 PE stated:

> Val shows strong technical capabilities and knowledge of the business systems related to Production control. He communicates well with his customers and is willing to go "above and beyond" to get the job done. He shows a commitment to supporting the values of Boeing Co. in his day-to-day dealings with co-workers, quality, ethics and business standards. Over the course of the next year we need to focus on improving inventory control. Val needs to help in identifying systemic problems in this area and take a leadership role in resolving those issues.

Pl.'s Resp. to Def.'s Mot. For Summ. J. at Ex. 4, p. 2.

Reid's manager, Chris Harmon, reviewed the ERP scores and then ranked the employees according to the numeric scores they received. Plaintiff ranked twenty-one (21) out of twenty-three (23). Pl.'s Resp. to Def.'s Mot. For Summ. J. Ex. 1. On January 4, 2002, Harmon then met with each of his direct reports who had filled out ERP assessment forms to discuss the relative rankings. Defendant asserts the purpose of this meeting was to protect against rater bias and to ensure that each of the managers was in agreement with the relative rankings. Plaintiff disputes that rater bias could have been prevented without a review of either the underlying ERP forms or the 2001 PE. (The only form reviewed in the meeting was a chart, illustrating the ERP rankings and supporting scores.) Countering, Defendant offers evidence that at the ERP meeting on January 4, 2002, a

number of managers recounted incidents in which Plaintiff caused inventory inaccuracies and incidents in which he failed to communicate. On January 9, 2002, the Skill Team met a final time to review, discuss, and approve the final relative rankings.

After the ERP was complete and approved, three Material Management Analysts were laid off. Jerry Wallingford (age fifty-nine (59)) (ranked twenty-three (23)) retired effective January 1, 2002. David Watkins (age forty-six (46)) (ranked twenty-two (22)) and Krista Harris (age thirty (30)) (ranked twenty (20)) were issued 60-day Layoff Notices.[3] Plaintiff's seniority to Harris allowed for Plaintiff to escape that lay-off.

Subsequently, in March 2002, a second excess of Material Management Analysts was declared. Plaintiff (age sixty-two (62)) (ranked twenty-one (21)), I. B. Johnson (age forty-eight (48)) (ranked nineteen (19)), and James Hobkirk (age forty-two (42)) (ranked eighteen (18)) were identified and issued 60-day Layoff Notices.[4]

Plaintiff argues the discrepancy between his 2001 PE and his ERP score, his manager's deposition testimony, the ERP process, and Defendant's treatment of both older and younger similarly situated workers prove Plaintiff's age was a motivating factor in Defendant's decision to terminate his employment.

Defendant claims there was no correlation between the ERP and PE. Defendant argues the PE rates the employee's performance in meeting his or her goals and objectives for that year and that it does not compare employees. The ERP, on other hand, Defendant says, is a retention tool that assesses the employee's competencies to meet the current and future needs of the business; the employee's performance relative to Defendant's goals and objectives; and, his/her behaviors against the Defendant's 2016 values. In short, the ERP takes into account the employee's performance and competencies in relationship to his or her peers. Furthermore, Defendant argues that Plaintiff's complaints question Defendant's business judgment rather than show age bias.

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which

would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-52 (1986); *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998); *see also, Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1216 (10th Cir. 2002) ("where the nonmoving party will bear the burden of proof at trial on a dispositive issue that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case in order to survive summary judgment.") (internal citations and quotations omitted).

## III. DISCUSSION

### *A. The McDonnell Douglas Burden Shifting Framework*

Claims under the ADEA are subject to the familiar burden-shifting framework set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Under the articulated test set forth in *McDonnell Douglas*, a plaintiff terminated as a result of a RIF must show that he can meet the following prima facie elements to demonstrate a claim for discrimination: (1) he was within the protected class; (2) at the time of the layoff, he was doing satisfactory work; (3) he was laid off in spite of the adequacy of his work; and (4) produce evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *See Jones v. Unisys Corp.*, 54 F.3d 624, 630 (10th Cir. 1995); *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988).

Making a prima facie case has the effect of creating a presumption of unlawful discrimination and the burden of production shifts to the employer to demonstrate some legitimate nondiscriminatory reason for the adverse employment action. *See Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 558 (10th Cir. 1996). If the employer offers such a reason, the burden shifts back to the employee to show that there is a genuine dispute of material fact as to whether the employer's reason for the challenged action is pretextual and unworthy of belief. *See Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1315-16 (10th Cir. 1999). The Plaintiff bears the ultimate burden of showing that he was the victim of intentional discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *MacDonald v. E. Wyo. Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991); *Merrick v. N. Natural Gas Co.*, 911 F.2d 426, 429 (10th Cir. 1990). The Court "must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a

reasonable jury that the employer had discriminated against the plaintiff." *MacDonald*, 941 F.2d at 1121.

*i. Prima Facie Case*

Generally, to establish a prima facie case of age discrimination in termination from employment, plaintiff must show that (1) he was a member of a protected age group, over forty (40); (2) he was performing satisfactorily; (3) defendant terminated his employment; and (4) defendant replaced him with a younger person. *BUI v. IBP, Inc.*, 171 F.Supp.2d 1168, 1173 (D.Kan. 2001) (*aff'd*, 34 Fed.Appx. 653 (10th Cir. 2002)). This test has been modified in the RIF context because the discharged employee is not always replaced. *See Shikles v. Sprint*, 2003 WL 22454012, *12 (D.Kan.). The fourth prong in a RIF case, where an employee is not replaced, requires a plaintiff to show evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *See Lucas*, 857 F.2d at 1400. To meet the fourth prong under the modified RIF prima facie test, "plaintiff need not produce evidence that age was a determining factor in [employer's decision]," *Shikles*, 2003 WL at *12 (quoting *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1167 (10th Cir. 1998)).

Defendant disputes that Plaintiff can meet the fourth element of his prima facie case. As support for this argument, Defendant offers evidence that Plaintiff was treated more favorably than younger employees. It is undisputed that Defendant terminated younger employees before Plaintiff and retained employees older than those younger employees laid off prior to Plaintiff. *See supra* at p. 5. In *Shikles*, the court held that a sixty (60) year old plaintiff failed to establish a prima facie case under the ADEA in the context of a RIF where the evidence showed that the defendant terminated other younger employees [under forty (40)] and retained other older [over (40)] employees. *See id.* at *13.

However, Plaintiff offers evidence that a forty-three (43) year old female, Ms. Erma Jernigan, filled Plaintiff's position upon his termination. Defendant offers no evidence to dispute Ms. Jernigan's hire. Because of this undisputed fact, the Court is inclined to apply the non-RIF modified prima facie elements, wherein the fourth element is satisfied when a younger employee replaces plaintiff in plaintiff's position. *See BUI v. IBP, Inc.*, 171 F.Supp.2d 1168, 1173 (D.Kan. 2001) (*aff'd* 34 Fed. Appx. 653 (10th Cir. 2002)). Of course, this younger employee replacing Plaintiff when Defendant claimed a need to eliminate his position would also satisfy the fourth element of the prima facie case in the modified RIF context. *See*

*Lucas*, 857 F.2d at 1400 (requiring only direct or circumstantial evidence from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the employment decision at issue). Because Ms. Jernigan, a younger employee, replaced Plaintiff, his prima facie case succeeds.[5]

*ii. Legitimate Non-Discriminatory Reason for Employment Decision*

Once a plaintiff meets the prima facie elements of his ADEA claim, the burden shifts to the Defendant to articulate a legitimate non-discriminatory reason for its employment decision. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Rea v. Martine Marietta Corp.*, 29 F.3d 1450, 1454 (10th Cir. 1996). Defendant maintains Plaintiff was laid off in the course of a company-wide RIF and further, that at the time of his layoff, Plaintiff's ERP ranking was the lowest in his job group.

*iii. Pretext*

Plaintiff may show pretext in the RIF context by demonstrating that: (1) his termination is inconsistent with the Defendant's RIF criteria; (2) Defendant deliberately falsified or manipulated his evaluation under RIF criteria; or (3) Defendant's RIF is a sham. *See Beaird*, 145 F.3d at 1168. Plaintiff's pretext claims are staked on the first two methods of proving pretext. Plaintiff does not contest the need for the RIF.

As evidence of pretext, Plaintiff offers the following five categories of evidence: (1) alleged discrepancy in the 2001 PEs and the ERP ratings evidencing age bias in the ERP process; (2) Plaintiff's thirty-six (36) year old manager's testimony regarding Plaintiff's future abilities; (3) Defendant's failure to detect age bias; (4) Defendant's treatment of other older similarly situated employees in the 2002 and 2003 RIFs and; (5) Defendant's treatment of other younger similarly situated workers in the 2002 and 2003 RIFs.

***Alleged Inconsistencies between the 2001 PE and the ERP***

Plaintiff offers an extensive exhibit (Exhibit 16), which he created, in order to demonstrate the inconsistencies in his 2001 PE and his ERP rating, and ultimately, in an attempt to show that the ERP is skewed in favor of younger employees.[6] Pl.'s Resp. to Def.'s Mot. for Summ. J. Ex. 16. There are a number of difficulties with this exhibit that prevent the

Court from considering it as factual evidence sufficient to defeat Defendant's legitimate non-discriminatory reason for excising Plaintiff.

In Exhibit 16, Plaintiff assigns numerical values to the PE ratings for values and behaviors.[7] Specifically, Plaintiff assigns numerical values to the PE ratings as follows: Fails to Meet Minimum Requirements ("FMR") – 1; Meets Minimum Requirements ("MMR") – 2; Meets Normal Requirements ("MNR") – 3; Exceeds Normal Requirements ("ENR") – 4; Far Exceeds Normal Requirements ("FER") – 5. Defendant did not use numeric values on the 2001 PE, *i.e.*, Plaintiff's 2001 PE indicated only that overall, Plaintiff "Meets Normal Requirements." Nine other Material Management Analysts were given the same rating. Twelve Material Management Analysts were rated "Exceeds Normal Requirements" and one Material Management Analyst was rated as "Far Exceeds Requirements." Def.'s Mot. for Summ. J. Ex. F at ¶5. Defendant did not use the PE ratings to rank these employees in relation to each other.

Plaintiff then uses the numerical values to make comparisons between the PE and ERP. For example, if the Plaintiff's generated PE scores were to be used, Plaintiff would rank higher than other employees than if only his ERP scores were used. Plaintiff goes on to make other comparisons using the two ranking methods to show Plaintiff was discriminated against. However, a close look at Exhibit 16 reveals that only a select number of Plaintiff's work group was included in Plaintiff's analysis. Plaintiff also uses invalid comparators such as comparing another employee's PE to that same employee's ERP where he was evaluated in a managerial position on his PE and then evaluated in a Material Management Analyst position on his ERP. Further, Plaintiff's analysis looks at employees who were evaluated by one manager for the purposes of the PE and another manager for the ERP. This selective choice of data presents a gerrymandered picture that is unreliable. Finally, Plaintiff does not have an expert to testify to the statistical significance of his information as analyzed, if any.

Plaintiff also claims that the discrepancy between Plaintiff's 2001 PE MNR score and his relatively lower ERP score show Defendant's intent to layoff older workers. Plaintiff seems to believe that if the 2001 PE was used at any time in the ERP, Plaintiff's ERP ranking should have been higher. However, Defendant offers evidence that the 2001 PE and the ERP were necessarily different measures of an employee's performance. The PE is used to rate the individual's performance, and the ERP, to rate the employee as compared to his peers. Plaintiff does not offer sufficient evidence to dispute these differences. Too, it appears only fifteen percent

(15%) of the ERP is identical to the 2001 PE, meaning the same competencies used on the PE only accounted for fifteen percent (15%) of the ERP rankings. And even though the same competencies were used, they were used to evaluate the employee's performance alone (on the PE) and the employee's performance in comparison to his peers (on the ERP). Furthermore, the bulk of the ERP score is not performance based, but rather is a rating of the employee's skills and abilities relative to his peers to meet current and future business needs. Plaintiff offers evidence of training materials and deposition testimony of one non-Skill Team manager suggesting that the 2001 PE was to be used in the ERP process. Defendant does not dispute this, but again offers ample evidence to find that although the 2001 PE was a starting point for the ERP, the two evaluations did not serve the same purpose.

Twelve other employees received the same MNR ranking as Plaintiff on the 2001 PE. Because Defendant had to make reductions in numbers of employees, it had to find a way to determine who was best retained. It makes perfect sense and reveals no discriminatory intent that not only would the ERP look at employees in relation to one another but that the 2001 PE would have to serve as a starting point for doing so.

The Court does not find the differences between the ERP and the 2001 PE suffice to show pretext on the part of the employer. In *Hemmert v. Quaker Oats Company*, 157 F.Supp.2d 864 (S.D. Ohio 2000), the plaintiff was laid off in a RIF. The plaintiff, Hemmert, during his more than sixteen (16) year career had never received a negative performance review, and his most recent performance rating indicated that he met or exceeded some expectations. Hemmert, along with four other employees holding the same job title, were reevaluated for retention purposes by their supervisor. Hemmert was laid off as a result of this more refined evaluation, in which he was compared to his peers and ranked last. He argued, similar to Plaintiff here, that his RIF score was manipulated consistent with the company's objective to lay off older workers. The court held that Hemmert failed to demonstrate pretext on the basis of alleged inconsistencies between the performance review and RIF ranking.

> In the context of [the Company's] RIF, however, plaintiff's supervisor necessarily had to differentiate between [plaintiff] and the other [employees holding the same job title] despite the fact that they had received identical ratings on their . . . annual reviews.
>
> . . . .

> If the mere fact that [plaintiff's supervisor] re-evaluated [plaintiff] and the others as part of the RIF were found sufficient to create a genuine issue of material fact, such a conclusion would preclude employers from attempting to choose the best employees to retain in a workforce reduction situation.

*Id.* at 873-74 & n. 16; *see also Kreimeyer v. Alliant Techsystems, Inc.*, 38 F.Supp.2d 1306, 1316-17 (D. Utah 1995) (alleged inconsistencies between performance appraisals and final rankings held insufficient to support inference of pretext where performance appraisals assessed individual performance and were not designed to compare one employee's performance to another's).

***Reid's Testimony as Evidence of Pretext***

Plaintiff claims his thirty-six (36) year old manager's testimony is conclusive evidence of age bias. In attempting to establish pretext, Plaintiff claims Reid intentionally and wrongfully downgraded Plaintiff on the relevant ERP. Consistent with Defendant's position that the PE and the ERP serve different purposes, Reid repeatedly explained the discrepancy by indicating such difference. Pl.'s Resp. to Def.'s Mot. for Summ. J. at Ex. 5, p. 47 ll. 11-25, p. 48 ll. 1-6. Furthermore, deposition testimony of other Skill Team members and Plaintiff's own deposition testimony buttressed Reid's comments regarding his justification of the ERP scoring.

Plaintiff also cites much of Reid's testimony wherein Reid states that he evaluated Plaintiff's potential for change and his ability to adapt to new circumstances. Plaintiff argues this is code for "you can't teach an old dog new tricks." Pl.'s Resp. to Def.'s Mot. for Summ. J. at p. 26. However, the Tenth Circuit has held, "Congress has recognized potential as a legitimate factor distinct from age" and "[s]imply because there may be correlation between age and potential does not mean that potential cannot be used as a selection criteria." *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 987 (10th Cir. 1996). Plaintiff also makes much of the fact that potential is a subjective criterion.[8] Again, the Tenth Circuit has weighed in, "even if potential is somewhat subjective, the use of subjective criteria does not suffice to prove intentional discrimination." *Id.* (citation omitted). Reid's evaluation of Plaintiff does not reveal the discriminatory motive necessary to establish pretext.

***Failure of the Skill Team to Correct Rater Bias***

Plaintiff's allegations of the Skill Team's alleged failure to correct rater bias stem from the fact that the Skill Team only met twice, once to select the competencies for the ERP, and once to review, discuss, and approve the ERP rankings. Plaintiff is upset at not only the number of meetings but also what was reviewed at the meetings. Further, Plaintiff is bothered that the Skill Team did not analyze the rankings for adverse impact to a certain group with specific characteristics. However, Denise Hendrickson, Defendant's HR representative, testified that only if there was a conclusive adverse impact (in previously conducted statistical analyses) on such a group would the analysis be brought to the Skill Team for further discussion.[9]

That Plaintiff believes the Skill Team should have met more, discussed more, and known more, does not show evidence of pretext. In deciding whether age was a determinative factor in the employment action, the Court will "not second guess business decisions made in the absence of some evidence of impermissible motives." *Doan v. Seagate Tech, Inc.*, 82 F.3d 974, 978 (10th Cir. 1996) (citation omitted). The Court is not to determine whether Defendant's decision to layoff Plaintiff was fair or correct, but whether its decision was motivated by illegal age discrimination. *See id.*

***Defendant's Treatment of Other Older Similarly Situated Employees***

Plaintiff offers evidence of two other older employees who were terminated in the 2002 and 2003 RIFs. In order for evidence of other terminations to be relevant to the issue of discriminatory motive, a plaintiff must show that such terminations are "reasonably related to the decision to terminate plaintiff." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999). This reasonable relationship requirement has been borne out in case law. For example, in *Curtis v. Oklahoma City Public Schools Board of Education*, 147 F.3d 1200 (10th Cir. 1998), the court excluded testimony from other former employees because it was not reasonably related to plaintiff's termination due to the fact that the witnesses and the plaintiff had different jobs, in different departments, under different supervisors.

Under Tenth Circuit law, neither of the employees Plaintiff offers as evidence of systemic age bias can be considered. James Hanna, age fifty-seven (57), worked in a different department than Plaintiff, under a

different supervisor, and performed a completely different job than Plaintiff. James Vaughn, age fifty eight (58), was laid off one year after Plaintiff and reported to a different supervisor. Furthermore, at the time of Vaughn's termination, the ERP criteria had changed as had some of the Skill Team members. Absent the same supervisors, or some other reasonable link, the Court cannot find the evidence of these terminations relevant to discriminatory motive. *See Schneider v. City and County of Denver*, 2002 WL 1938583, *7 (10th Cir.); *Heno v. Spring United Mgmt. Co.*, 208 F.2d 847, 856 (10th Cir. 2000) (both indicating that a plaintiff can show the evidence is reasonably related to the decision to terminate plaintiff if the same supervisors were involved in the prior discriminatory employment actions).

In support of consideration of this evidence, Plaintiff offers *Green v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996) and *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991) where the Tenth Circuit held "evidence concerning make-up of the employment force and events that occurred after plaintiff's termination were entirely relevant to the question of whether or not age was one of the determinative reason's for plaintiff's termination . . . ." *Green*, 98 F.3d at 561 (quoting *Bingman*, 937 F.2d at 556). *Bingman* is distinguishable in that all of the discharged employees there appeared to have the same supervisor. Likewise in *Green*, "with [the new CEO's] ascendancy, there was a high-level effort that caused these retirement or resignations and that age was a determining factor." *Id.* at 561 (internal quotations and citations omitted). The factual scenario of the 2002 RIF and the employees discharged therein simply does not pair with the facts of the *Bingman* and *Green*. As such, the Court is led by the cases involving RIFs which require a reasonable relationship between the plaintiff's termination and others terminated simultaneously or later, namely the same supervisor involved in all of the terminations offered as circumstantial evidence to the termination at issue.

Plaintiff also claims that statistical evidence, generated by Defendant, demonstrates its systemic bias against older workers. As previously mentioned, at various times throughout the ERP processes, Defendant performed statistical analyses to determine whether there was any adverse impact on employees over the age of forty (40) and over the age of fifty-five (55). These analyses, termed Impact Ration Analysis ("IRA"), were conducted in January and April of 2002. Plaintiff claims the IRAs are capable of showing pretext, because they do not meet the Four-Fifths Rule, also known as the 80% Rule. *See* 29 C.F.R. §1607.4(d). This is an Equal Employment Opportunity Commission ("EEOC") guideline that is often used to statistically test the treatment of favored and

disfavored groups. *See* PAETZHOLD, THE STATISTICS OF DISCRIMINATION, USING STATISTICAL EVIDENCE IN DISCRIMINATION CASES, §5.06 *The Four-Fifths Rule*, p. 5-11. However, the 80% Rule is not applicable in ADEA cases. 29 C.F.R. §1607.4(d). And even if it were applicable, the results would be highly suspect because of the small sample size. *See*, PAETZHOLD, at pp. 5-11 & 5-14 – 5-15; *EEOC v. Joint Apprenticeship Committee of the Joint Indus. Bd. of Electrical Indus.*, 164 F.3d 89, 97 (2d Cir. 1997); *see also, Ingram v. NWS, Inc.*, 1997 WL 688882, *12 (N.D.Ill.) (detailing cases where smaller sample sizes were found suspect and evaluated with caution, regardless of the 80% Rule). Because the use of the 80% Rule is specifically excluded from ADEA cases, the Court will not assess the statistical data under the 80% Rule.[10]

Throughout this litigation, Defendant has maintained the IRAs performed at times relevant to this lawsuit showed no adverse impact upon older employees. Such claim is explained in an affidavit presented by Joseph Clark, Defendant's EEO/AA Administrator. Rather than employing the 80% Rule, Clark used the Standard Deviation to determine adverse impact. *See* Def.'s Resp. to Pl.'s First.Supp. to Def.'s Mot. for Summ. J. Ex. B. Clark stated, "I do not use Column K – [the] 80% Rule because it only indicates a possible disparity in selection rates; it does not indicate whether a protected group suffered a statistically significant adverse impact." *Id.* At ¶12. The Standard Deviation has been sanctioned as relevant and useful in the ADEA disparate treatment context. *See McAlester v. United Airlines*, 851 F.2d 1249, 1258 (10th Cir. 1988); *Schanzer v. United Tech. Corp.*, 120 F.Supp.2d 200, 204 & n.1 (D. Conn. 2000). Clark prefers the Standard Deviation because it analyzes disparities in selection rates to determine whether they are statistically significant. Def.'s Resp. to Pl.'s First. Supp. to Def.'s Mot. for Summ. J. Ex. B at ¶12. Here, Defendant looked at the results of the Standard Deviation test and found no adverse impact to older employees.[11] To that end, the Court finds nothing material about the statistical analyses as they do not reveal any adverse impact.

Moreoever, [s]tatistics taken in isolation are generally not probative of age discrimination." *Jones v. Unisys Corp.*, 54 F.3d 624, 632 (10th Cir. 1995); *see also Smith v. Bd. of County Comm'rs of Johnson County*, 96 F.Supp.2d 1177, (D. Kan. 2000) (refusing to find pretext where plaintiff's statistical evidence tested only a small subgroup and failed to evaluate the evidence against the total number of employees over and under forty (40). None of Plaintiff's evidence of treatment of other, older, similarly situated employees is sufficient to show pretext.

***Defendant's Treatment of Other Similarly Situated Younger Employees***

As further evidence of Defendant's discriminatory motives, Plaintiff offers evidence that younger employees were transferred to the Production Control department to work as Production Coordinators. Within a month of the Defendant's forced ranking, two employees, David Doyle and Rosa Jerome, both younger than Plaintiff, became Production Coordinators. Doyle and Jerome were both managers at the time the 2002 excesses were declared and were to be laid off. However, in accordance with Defendant's redeployment policy, there were transferred to Material Management positions. Plaintiff is simply not similarly situated to these former managers who were transferred pursuant to company policy. *See Michaelson v. Waitt Broad, Inc.*, 187 F.Supp.2d 1059 (N.D. Iowa 2000) (noting courts typically do not view managers and executives as similarly situated to staff workers). Preferential treatment for former managers does not indicate discriminatory motive driven by age.

Plaintiff also complains that three younger Production Coordinators, who were issued layoff notices, were not ultimately terminated. Krista Harris (age thirty (30)) was terminated from her position before Plaintiff, and then in accord with the redeployment policy, applied for another open position, which she received.[12] Bernice Johnson's (age forty-eight (48)) layoff was delayed because of an increase in her workload. James Hobkirk's (age forty-two (42)) layoff was prevented because the Production Manager over him offered to reduce his headcount by one in order to retain Hobkirk to maintain support in the area of military spares, a function performed by Hobkirk. Both Johnson and Hobkirk ranked above Plaintiff in the ERP. Plaintiff does not dispute the reasons given for the retention of these employees. The Court simply cannot discern discriminatory intent from this evidence. Here again, Plaintiff cannot establish the pretext necessary to survive summary judgment.[13]

## IV. CONCLUSION

While Plaintiff may have established a prima facie case, he has not offered sufficient evidence to permit a jury to find that the employer's asserted justification is false. *See Reeves*, 530 U.S. at 148. Nor has he eliminated all legitimate reasons for his termination. *See id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). The decision to terminate Plaintiff does not appear to have been pretextual or motivated by a prohibited reason. Plaintiff was laid off as a result of his ERP ranking

in the course of legitimate RIF. *See Reeves*, 530 U.S. at 148 ("an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision"). Plaintiff has failed to meet his burden and his claim cannot survive.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (Dkt. No. 29) is GRANTED and Plaintiff's claim is DISMISSED.

**ORDERED THIS 26th DAY OF FEBRUARY, 2004.**

**TERENCE KERN,**
**UNITED STATES DISTRICT JUDGE**

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[1] Plaintiff disputes that the job groups were appropriate, arguing some five employees should have been compared with another, but unspecified job group. However, the testimony offered to dispute the groupings was not from a Skill Team member, and Plaintiff does not provide information about what impact, if any, the alleged inappropriate grouping may have had on Plaintiff's ERP ranking. In short, if this fact is conceded as disputed, it does not seem to make a difference.

[2] *See infra* at pp. 12-13.

[3] Watkins was laid off effective March 23, 2002. Harris, as a result of the Company's Redeployment Policy, applied for and was selected for another open position effective March 22, 2002.

[4] Johnson's notice was subsequently cancelled due to an increase in workload in Johnson's function. Hobkirk's notice was cancelled after a production manager offered to reduce headcount by one in his organization in order to maintain the level of support in the area of military spares, a function of Hobkirk's.

[5] Under the ADEA, a plaintiff must be at least forty (40) years old to fall within the protected class. *See* 29 U.S.C. §631(a). However, it has been established that "[t]he fact that one person in a protected class has lost out to another person in the protected class is . . . irrelevant so long as he lost out because of his age." *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). But the younger employee cannot be insignificantly younger. *Id.* Here, the Plaintiff and Ms. Jernigan differed in age by nineteen (19) years. The Court finds this a sufficiently significant difference in age.

[6] Defendant filed two Motions in Limine (Dkt. Nos. 28 and 30) regarding evidence offered by Plaintiff. One motion pertained to Exhibit 16 and the other to multiple potential evidentiary issues. Both parties incorporated their briefing on the Motions in Limine in their summary judgment briefing. To that extent, the Court considered such in its resolution of the matter at hand. That being said, Plaintiff's Motion to Dismiss Motions in Limine (Dkt. No. 37) is denied.

[7] These same values and behaviors or competencies appeared on the 2016 Values portion of the ERP, which accounted for fifteen percent (15%) of the ERP. However, see *infra* pp. 12-13.

[8] Defendant maintains that Reid evaluated Plaintiff objectively. For example, Defendant notes that when Reid was asked to explain Plaintiff's ERP score in the communications category, Reid testified that score was based on his observation that Plaintiff was not proactive in his communications with his customers.

[9] *See infra* at pp. 17-18.

[10] The relevant IRAs do show a category revealing analysis of the data when tested by the 80% Rule. Defendant claims that it did not design the tool performing the impact ratio analysis nor did it modify the tool to eliminate the column showing the results of data when analyzed by the 80% Rule.

[11] The Standard Deviation column on the IRAs is blank, which, as explained by Clark means that there was no adverse impact found when the data was tested against the Standard Deviation. *See* Def.'s Resp. to Pl.'s First Supp. to Def.'s Mot. for Summ. J. Ex. B. Based on Defendant's repeated representations to the Court that the IRAs showed no adverse impact on older employees, and numerous opportunities to recast its argument, the Court accepts this explanation. Finally, Clark's affidavit makes no mention of what the figures in the Fisher's Exact column reveal, although Clark states he does prefer it to the Standard Deviation in certain circumstances. The Court does not have the requisite knowledge to interpret the Fisher Exact figures but infers that Defendant only relied on the Standard Deviation in determining that there was no adverse impact.

[12] Plaintiff declined to take advantage of the redeployment policy and apply for an open position.

[13] The Court feels compelled to address the fact that Plaintiff's position was filled by a younger worker, Ms. Jernigan. This was previously discussed and accepted as a primary reason for the Court's finding of Plaintiff's prima facie case. *See supra* at p. 9. The Court cannot find any evidence which contradicts Ms. Jernigan's replacing Defendant. Yet Plaintiff fails to offer this as evidence of pretext. From the limited evidence offered regarding Ms. Jernigan, the Court cannot discern pretext on this fact alone.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 02-CV-807-K(J)

VALENTINO ZUNIGA,

Plaintiff,

vs.

THE BOEING COMPANY,

Defendant.

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**AMENDED JUDGMENT**

Filed March 3, 2004

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This matter came before the Court for consideration of Defendant's Motion for Summary Judgment. The issues having been duly considered and a decision having been rendered in an Order contemporaneously filed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendant and against Plaintiff.

ORDERED this 3rd day of March, 2003

TERENCE C. KERN,
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-5033

VALENTINO ZUNIGA,

Plaintiff - Appellant,

vs.

THE BOEING COMPANY,

Defendant-Appellee.

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ORDER

Filed August 1, 2005

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Before **LUCERO, PORFILIO** and **BALDOCK**, Circuit Judges.

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Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

By: Deputy Clerk